



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: JULY 12, 2022

IN THE MATTER OF:

Appeal Board No. 621998

PRESENT: MICHAEL T. GREASON, MEMBER

In Appeal Board Nos. 621998 and 621999, the claimant appeals from the decision of the Administrative Law Judge filed March 1, 2022, insofar as it sustained the initial determination disqualifying the claimant from receiving benefits, effective November 2, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to November 2, 2021 cannot be used toward the establishment of a claim for benefits. The Board, on its own motion pursuant to Labor Law § 534, has reopened and

reconsidered the decision of the Administrative Law Judge, insofar as it overruled the alternate determination disqualifying the claimant from receiving benefits, effective November 2, 2021, on the basis that she voluntarily separated from employment without good cause.

The Administrative Law Judge held a hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There was an appearance by the claimant.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant worked for the employer, a nursing home and rehabilitation center, for 25 years, last serving as an environmental services employee. She was stationed in the employer's daycare center satellite building. In August 2021, the employer notified the claimant that she was required to receive a COVID-19 vaccine in order to remain employed. The claimant requested, and was granted, a religious exemption from the vaccine

and continued in her employment.

On October 29, 2021, the United States Court of Appeals for the Second Circuit vacated the lower court's temporary injunction that permitted religious exemptions to the New York State Department of Health's vaccine mandate for all employees of healthcare facilities, nursing homes and rehabilitation centers. On November 2, the employer advised the claimant that religious exemptions were no longer available in light of the Court's ruling. Because the claimant remained unvaccinated, the employer removed her from the schedule. The claimant asked if she could continue to be tested for COVID-19 instead of getting the vaccine. The employer denied her request.

The claimant was placed on an unpaid leave of absence for 30 days. She was advised that she would be reinstated if she became vaccinated during that time; if she did not, she would be considered terminated for cause at the end of the leave period. The claimant's union confirmed with the claimant that the mandate must be followed in order for her to remain employed. The claimant refused to be vaccinated due to her religious beliefs and was not permitted to return to work at the end of the unpaid leave period.

OPINION: The credible evidence establishes that the claimant's employment ended on November 2, 2021, because she refused to receive the COVID-19 vaccine, a condition of continued employment. There is no dispute that the claimant was aware of this requirement and its applicability to her as an employee of a healthcare facility, or that she knew that she could not continue her employment if she did not comply with it. It is further undisputed that the employer discharged the claimant because she chose not to get the vaccine and that if she had been vaccinated as required, she could have continued in her employment.

However, because the claimant was aware of the vaccine mandate and that she could be separated from employment if she chose not to be vaccinated, we find that she provoked her own discharge. A provoked discharge occurs when a claimant voluntarily violates a legitimate known obligation, leaving the employer no choice but to discharge her. A provoked discharge is considered a voluntary leaving of employment without good cause for unemployment insurance purposes and subjects a claimant to a disqualification from receiving benefits (see, *Matter of DeGrego*, 39 NY2d 180 [3d Dept.1976]).

In this matter, the obligation in question was compliance with the employer's

vaccine requirement. It is significant that the State of New York mandated in August 2021 that all healthcare workers be vaccinated against COVID-19 during the worldwide pandemic (see 10 N.Y.C.R.R. § 2.61). The Courts have long held

that New York State has the authority to regulate public health, including mandating vaccination to curb the spread of disease (see *Matter of Garcia v. New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601 [2018], which upheld mandated annual influenza vaccinations for children attending childcare programs in New York City; *Matter of C.F. v. New York City Dept of Health & Mental Hygiene*, 191 AD3d 52 [2d Dept 2020], holding that a municipal agency had the authority to require immunizations of adults in an area where there was an outbreak of measles if authorized by law; and *Matter of New York City Mun. Labor Comm. v. City of New York*, 73 Misc.3d 621 [Sup. Ct. N.Y. Cnty. 2021]. In that case, the Court declined to grant a temporary restraining order of the implementation of the New York City Department of Education's COVID-19 vaccine mandate for its employees, noting that there was no dispute that the Department of Health and Mental Hygiene had the authority to issue the mandate and that the Court "...cannot and will not substitute [others'] judgment for that of New York City's public health experts," citing *New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82 v. Cuomo*, 64 NY2d 233, 237-40 [1984]). Because of the severity of the ongoing COVID-19 crisis and healthcare providers' need to protect the health of their employees and patients, the emergency regulation requiring all healthcare employees to be vaccinated against COVID-19 was justified by a compelling governmental interest. We therefore find that the employer's requirement that the claimant be vaccinated was a legitimate obligation and that the employer had no choice but to end the claimant's employment when she refused to meet it.

We now turn to the claimant's contention that her refusal to vaccinate was based on religious concerns for which she sought, and was denied, an exemption. We note that the Supreme Court of the United States has held that "... an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" (see *Employment Div. v. Smith*, 494 US 872, 879 [1990]). The Court determined that provided a law is neutral and not aimed at a specific religion, is generally applicable, and pertains to an area of law the government has the ability to regulate, it cannot be preempted by a religious practice. In the matter now before us, there is no allegation that the state cannot regulate the healthcare industry, that the law is not generally applicable to those in that industry, or that it targeted a specific religion.

Further, in *Dr. A et al v. Hochul*, 142 S.Ct. 552 (2021), the Court denied an application for injunctive relief in a challenge to New York State's law removing religious exemptions from its COVID-19 vaccine mandate for hospital workers. Additionally, the Second Circuit in *We the Patriots USA, Inc. v. Hochul* 2021 U.S. App. LEXIS 32921 (2d Cir 2021), upheld New York's COVID-19 vaccine mandate for hospital employees without religious exemptions. ]). The Supreme Court of the United States has also upheld the vaccine requirement for healthcare workers in healthcare facilities receiving Medicare/Medicaid funds (see *Matter of Biden v. Missouri*, No. 21A240, and *Becerra v. Louisiana*, No. 21A241, 595 U.S. \_\_\_, January 13, 2022)

Under these circumstances, we find that the claimant's personal beliefs do not outweigh the employer's interest in protecting the health and safety of its employees and patients. The claimant therefore has not substantiated that she had good cause for ending continuing employment. We accordingly conclude that she was properly denied benefits. In light of the foregoing, the issue of misconduct is academic.

DECISION: The decision of the Administrative Law Judge is modified as follows and, as so modified, is affirmed.

The initial determination, disqualifying the claimant from receiving benefits, effective November 2, 2021, on the basis that the claimant voluntarily separated from employment without good cause, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER